Supreme Court, U.S.
FILED
SEP. 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-326

IN THE

Supreme Court of the United States

G. D. SE[illegible]LE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, et al,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Michael V. Ciresi
*Roger P. Brosnahan
Thomas J. Conlin
ROBINS, ZELLE, LARSON & KAPLAN
1800 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-8500
Attorneys for Respondents
**Counsel of Record*

1987—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... (ii)

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. THE COURTS BELOW CORRECTLY CONCLUDED THAT, AFTER REDACTIONS, CERTAIN OF SEARLE'S RISK MANAGEMENT DOCUMENTS ARE NOT ENTITLED TO PROTECTION AS WORK PRODUCT UNDER FED. R. CIV. P. 26(b)(3) AND *HICKMAN* 8

II. THE COURTS BELOW CORRECTLY APPLIED THE MINNESOTA ATTORNEY-CLIENT PRIVILEGE 12

III. THE FACT THAT SEARLE'S PRODUCT HAS INJURED MANY PEOPLE RESULTING IN MULTIPLE CASES DOES NOT JUSTIFY AN EXPANSION OF EITHER THE WORK PRODUCT DOCTRINE OR THE ATTORNEY-CLIENT PRIVILEGE 14

CONCLUSION 16

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Cases:

Brown v. St. Paul City Ry. Co., 62 N.W.2d 688 (Minn. 1954) 6, 7, 12
Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) *on rehearing*, 572 F.2d 606 (8th Cir. 1978) 9
Hickman v. Taylor, 329 U.S. 495 (1947) 7, 8, 10
In Re Grand Jury Investigation (Sun Co.), 599 F.2d 1224, (3rd Cir. 1979) 11
In Re Grand Jury Proceedings (FMC Corporation), 604 F.2d 798, (3rd Cir. 1979) 11
In Re Grand Jury Witness (Salas), 695 F.2d 359 (9th Cir. 1982) 13
Leer v. Chicago, Milwaukee, St. Paul & Pacific Railway Co., 308 N.W.2d 305 (Minn. 1981) 12
Matter of Witness Before the Special March 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984) 13-14
Mission National Ins. Co. v. Lilly, 112 F.R.D. 160 (D. Minn. 1986) 7
Simon v. Searle, 816 F.2d 397 (8th Cir. 1987), opinion below, Pet. App. 1 7
United States v. Davis, 636 F.2d 1028 (5th Cir. 1981) 8
United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982) *reh'q denied*, 688 F.2d 840, *cert. denied*, 466 U.S. 944 (1984) 10, 11
United States v. Gulf Oil Corporation, 760 F.2d 292 (Temp. Emer. Ct. App. 1985) 8
Upjohn Co. v. U.S., 449 U.S. 383 (1981) 7

Statutes:

28 U.S.C. § 1292(b) 4
Minn. Stat. § 595.02(2) 12

Rules:

Fed. R. Civ. P. 26(b)(3) 3, 8
Supreme Court Rule 17.1 6-7
Federal Rule of Evidence 501 12

Other Authorities:

8 C. Wright and A. Miller, *Federal Practice and Procedure* § 2024, at 198-199 (1970) 8-9

IN THE

Supreme Court of the United States

No. 87-326

G. D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, et al,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

These cases, consolidated for discovery, are products liability cases in which the plaintiffs suffered infection of their reproductive organs — for many causing infertility — as a result of their use of petitioner's product, the Cu-7 intrauterine contraceptive device (IUD). Petitioner G. D. Searle & Co. ("Searle") seeks review of the Eighth Circuit's affirmance of a district court order permitting discovery of certain Searle business documents. The documents which Searle seeks to shield from discovery are "business documents revealing the corporate action, analysis and planning . . .", which "reflect on key issues pertinent to the litigation" because they "relate to the issues of notice, defect

and questions relating to punitive damages." Pet. App. 31, 29. These documents were part of approximately 500 documents reviewed *in camera* by the special master, document-by-document, to evaluate Searle's privilege claims. The special master found more than 220 documents completely protected from discovery because they revealed either litigation work product or confidential attorney-client communications. The special master found others partially protected for the same reasons, and the remainder discoverable in their entirety because they were prepared for business, not litigation purposes, and because they did not reveal confidential attorney-client communications. All case-specific reserve information, and other privileged material, was ordered redacted. Pet. App. 30, 32, 34, 36, 37.

In his reports the special master recognized that Searle's conduct is central to this litigation: "What the corporation knew, the judgments it made with respect to marketing and manufacturing the product are in issue in these cases. These documents are relevant to and are calculated to lead to discoverable evidence on these issues." Pet. App. 29. The special master also specifically recognized not only the relevance of the documents, but also plaintiffs' substantial need for the documents:

> The materials reflect on key issues pertinent to this litigation. To prove these issues the parties must have these business documents revealing the corporation action, analysis, and planning.

Pet. App. 31. The special master found that "[n]one of the documents reviewed involve Risk Management giving legal advice or playing a role in specific litigation strategy in any of the cases." Pet. App. 28.

After the special master issued his reports, the district court conducted a hearing involving both parties and the special master, during which the court examined the special master with respect to his findings. The special master stated:

> [I]f you are going to litigate corporation action, the key to corporate action are the documents that are created in the corporate committees—the documents going back and forth, the budget decisions—that these represent the corporate action and the corporate decision making; and that the documents that we are talking about, then, are key to the decisions that were made by the corporation at this particular point in time. And I am not sure that you can duplicate this information by asking various officers what they thought at a particular point in time. The documents are what you are going to need to establish what the corporation as an entity knew, what the corporation did; and the decisions that the corporation made are reflected in these documents. So I do view them as key.

Resp. App. 2.

Finally, as an alternative ground for production, the special master specifically found that the plaintiffs had established substantial need and undue hardship pursuant to Fed. R. Civ. P. 26(b)(3), even assuming the documents were work product:

> If the court concludes they are work product, I would conclude that they are far removed from the attorney's strategy about a particular case, and they reflect more general business strategy of the corporation, and because of the necessity for proving what the corporation knew and what the corporation did, I believe that the standard has been met by the plaintiffs to produce this ordinary work product.

Resp. App. 2-3; *see, also,* Pet. App. 31, Report (I) of Special Master.

The district court carefully reviewed the special master's factual findings and legal analysis and adopted them, including the special master's redactions. The district court did, however, grant Searle's request for certification pursuant to 28 U.S.C. § 1292(b). The certified issues confirmed that only "some portions of the documents" at issue contain aggregate reserve information. *See* Pet. App. 38-39, issue 1.

On appeal, Searle filed *in camera* with the Eighth Circuit six documents which it claimed were representative of the others held discoverable. Searle unilaterally selected the six documents—without review by the district court or special master to insure that the "sample" was truly representative. Moreover, Searle did not redact any of the documents in accordance with the redactions ordered by the district court before filing them with the Eighth Circuit. Basic principles of advocacy, as well as common sense, practically assure that the documents selected by Searle were the least inculpatory of those documents found discoverable. Indeed, it appears that Searle's unsolicited selection was heavily weighted with aggregate reserve documents, as opposed to documents relating to notice, defect and punitive damages, allowing Searle to bootstrap its argument on appeal.

Despite Searle's unilateral *in camera* submission of the six documents, the Eighth Circuit concluded that the special master and the district court properly applied the correct law and made reasonable factual findings with respect to both the work product doctrine and the attorney-client privilege. The Eighth Circuit specifically rejected Searle's claim that the individual case reserves and the aggregate

case reserves are indistinguishable for the purpose of applying the work product doctrine:

> Although the risk management documents were not themselves prepared in anticipation of litigation, they may be protected from discovery to the extent that they disclosed the individual case reserves calculated by Searle's attorneys. The individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product. . . . The individual figures lose their identity when combined to create the aggregate information. Furthermore, the aggregates are not even direct compilations of the individual figures; the aggregate information is the product of a formula that factors in variables such as inflation, further diluting the individual reserve figures. Certainly it would be impossible to trace back and uncover the reserve for any individual case, and it would be a dubious undertaking to attempt to derive meaningful averages from the aggregates, given the possibility of large variations in case estimates for everything from frivolous suits to those with the most serious injuries.

Pet. App. 8.

Elsewhere the court noted: "Clairvoyants aside, no one will learn from the aggregate reserve figures what Searle's attorneys were thinking when they set individual case reserves." Pet. App. 9.

Concerning Searle's attorney-client privilege claims, the Eighth Circuit concluded that the special master had recognized and correctly applied the proper legal principles:

> Relying on *Brown v. St. Paul City Ry. Co.*, 62 N.W.2d 688 (Minn. 1954), the special master stated: "A business document is not made privileged by providing a copy to counsel. * * * Thus, those documents from one corporate officer to another with a copy sent to an attorney do not qualify as attorney client communications." We perceive no error in this statement of the law, which appears to have been carefully applied by the special master to the point of redacting sections of privileged material from within the individual documents.

Pet. App. 11.

The Eighth Circuit therefore affirmed the district court. According Searle even further protection, the Eighth Circuit directed the district court to again review the documents to ensure that no work product or confidential communications are disclosed in the documents after redaction. Before this re-review was even undertaken, Searle petitioned the Eighth Circuit for a rehearing, which was denied.

REASONS FOR DENYING THE WRIT

Under Rule 17 of the United States Supreme Court Rules, this Court will grant a writ of certiorari "only when there are special and important reasons therefore." These reasons include:

> When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; . . . [or] [w]hen a state court or a federal court of appeals has decided an important question of federal law which has not been but should be settled

> by this Court, or has decided a federal question in a way in conflict with the applicable decisions of this Court.

Supreme Court Rule 17.1.

The Eighth Circuit's decision to affirm limited production of Searle's risk management files establishes no new principles of law and is entirely consistent with this Court's decisions in *Hickman v. Taylor* and *Upjohn Co. v. U.S.*, and with decisions of other federal courts of appeals and the Minnesota Supreme Court. These courts recognize that application of the work product doctrine and the attorney-client privilege is fact-specific. *See, e.g., Upjohn Co. v. U.S.*, 449 U.S. 395, 397 (1981) (while a case-by-case analysis of the attorney-client privilege "may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the rules"); *Brown v. St. Paul City Ry. Co.*, 62 N.W.2d 688, 701 (Minn. 1954) ("whether a document or communication is privileged is a question of fact"); *Simon v. Searle, opinion below*, Pet. App. 6 ("determination of whether the documents were prepared in anticipation of litigation is clearly a factual determination"); *Mission National Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986) (in analyzing work product claims, the "most sound" approach is a case-by-case analysis considering the unique factual context of the given problem").

The instant case presents only a factual dispute, not an important question of federal law. There are no special and important reasons for a grant of certiorari, and Searle's petition should be denied.

I.

The Courts Below Correctly Concluded That, After Redactions, Certain of Searle's Risk Management Documents Are Not Entitled to Protection as Work Product Under Fed. R. Civ. P. 26(b)(3) and *Hickman*.

The work product doctrine was first established in *Hickman v. Taylor*, 329 U.S. 495 (1947), and is now codified in Fed. R. Civ. P. 26(b)(3). Materials assembled in the "ordinary course of business . . . or for other non-litigation purposes" are not immune from discovery by the work product doctrine. Fed. R. Civ. P. 26(b)(3) Advisory Committee Notes. The threshold factual question in applying the doctrine is determination of the primary motivating purpose of the document:

> Our inquiry should be to determine "the primary motivating purpose behind the creation of a document." *See United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981). If the primary motivating purpose behind the creation of a document is not to assist in pending or impending litigation, then a finding that the document enjoys work-product immunity is not mandated.

United States v. Gulf Oil Corporation, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985). In the words of Professors Wright and Miller:

> [T]he test should be whether, *in light of the nature of the document and the factual situation in the particular case*, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

8 C. Wright and A. Miller, *Federal Practice and Procedure* § 2024, at 198-199 (1970) (emphasis supplied), adopted by *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977), *on rehearing*, 572 F.2d 606 (8th Cir. 1978) (en banc).

Based on its review of Searle's affidavits, document summaries, briefs, and the "sample" documents submitted *in camera* by Searle, as well as the findings of the district court and the special master, the court of appeals affirmed the district court's ruling protecting individual case reserves calculated by Searle's attorneys, Pet. App. 8, but also agreed that documents prepared by Searle's risk management department were not prepared in anticipation of litigation, since that department "was not involved in giving legal advice or in mapping litigation strategy in any individual case." Pet. App. 7. According to the court of appeals, the district court's finding that Searle's risk management documents "are in the nature of business planning documents" was a "reasonable factual conclusion." Pet. App. 7.[1]

The special master found, and the district court and the Eighth Circuit agreed, that the connection between aggregate reserve information and individual case reserves was too attenuated to permit inferring specific reserves from the aggregate. Because aggregate reserve information reflects not only actual pending cases, but also potential cases, and because some of the reserve information includes products other than the Cu-7, it will be mathematically impossible for

[1]The special master concluded, in the alternative, that even if aggregate reserves revealed in Searle's risk management documents constituted work product, it was "ordinary work product subject to the substantial need and undue hardship requirement." The special master found that the plaintiffs had met this burden, since to prove the "key issues" in this litigation, plaintiffs "must have these business documents revealing the corporate action, analysis and planning." Pet. App. 31.

plaintiffs to ascertain specific Cu-7 reserves from the aggregate.[2] Searle's objection that in permitting access to aggregate reserve information, the court permitted limited disclosure of protected work product is a distortion of the record. The court ordered production of documents containing aggregate reserve information precisely because the information did *not* disclose, directly or indirectly, protected work product.

Instead of departing from the principles of *Hickman v. Taylor*, the district court and the Eighth Circuit steadfastly adhered to them. In *Hickman*, this court explained that the purpose of work product protection was to ensure the "proper preparation of a client's case." *Hickman*, 329 U.S. at 511. As the Eighth Circuit concluded, with case specific information redacted, disclosure of documents discussing litigation reserve planning conducted by non-lawyer company employees reveals nothing about an attorney's preparation of a specific case: "Clairvoyants aside, no one will learn from the aggregate reserve figures what Searle's attorneys were thinking when they set individual case reserves." Pet. App. 9.

In an analogous case, in which this Court denied a petition for certiorari, the Fifth Circuit ruled that a taxpayer's "tax pool analysis," prepared by attorneys and accountants to identify potential tax liabilities and to set aside reserve funds to cover these contingent liabilities, was not immune from discovery by the work product doctrine. *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), *reh'g denied*, 688 F.2d 840, *cert. denied*, 466 U.S. 944 (1984). The Fifth Circuit held that documents prepared by a team of accountants and lawyers which discussed those areas in

---

[2]The special master specifically directed redaction of those portions of documents which reveal methodology for figuring reserves. Pet. App. 34, n. 10.

which the corporation, in preparing its tax return, had taken a position that might result in litigation were not prepared "in anticipation of litigation," but rather, "in the ordinary course of business." According to the court:

> The primary motivating force behind the tax pool analysis, therefore, is not to ready El Paso for litigation over its tax returns. Rather, the primary motivation is to anticipate, for financial reporting purposes, what the impact of litigation might be on the company's tax liability. El Paso thus creates the tax pool analysis with an eye on its business needs, not on its legal ones.

Id. at 543. Like El Paso's tax pool analysis, Searle's risk management documents were not prepared to help defend litigation but rather for business planning purposes, and therefore must be produced. This Court recognized in *El Paso* that no legal issues worthy of its consideration were presented and denied El Paso's petition for certiorari.

As the courts have recognized, "[b]ecause the work product doctrine obstructs the search for truth and because its benefits are, at best, 'indirect and speculative,' it must be 'strictly confined within the narrowest possible limits consistent with the logic of its principles.'" *In Re Grand Jury Proceedings (FMC Corporation),* 604 F.2d 798, 802-803 (3rd Cir. 1979), *quoting from In Re Grand Jury Investigation (Sun Co.),* 599 F.2d 1223, 1235 (3rd Cir. 1979). This court should deny Searle's petition because the courts below properly analyzed and applied well-established work product principles.

II.

The Courts Below Correctly Applied the Minnesota Attorney-Client Privilege.

Federal Rule of Evidence 501 provides that evidentiary privileges are determined by state law in diversity actions. The Minnesota attorney-client privilege, codified in Minn. Stat. § 595.02(2) provides:

> An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

Because the attorney-client privilege is a barrier to disclosure and tends to suppress relevant facts, the privilege must be "strictly construed." *Leer v. Chicago, Milwaukee, St. Paul & Pacific Railway Co.*, 308 N.W.2d 305, 309 (Minn. 1981). Furthermore, the privilege does not apply at all unless the client communicates confidential information to the attorney *for the purpose* of obtaining legal advice. *Brown v. St. Paul City Ry. Co.*, 62 N.W.2d 688, 700 (Minn. 1954).

Based on these principles, the special master carefully reviewed each of the disputed documents and shielded from disclosure all of those documents, or portions of documents, which would reveal confidential communications from Searle to its attorneys communicated for the purpose of obtaining legal advice. The district court properly refused to apply the attorney-client privilege to certain business documents which were simply copied to attorneys without either an express or implied request for legal advice or

services. Pet. App. 31. The Eighth Circuit agreed, noting that the special master appeared even to have applied the principle that requests for legal advice can sometimes be implied from delivery of a document to an attorney. Pet. App. 11-12. Such was not the case here.

Searle contends that the Eighth Circuit's ruling conflicts with a number of decisions holding that the attorney-client privilege attaches to communications not only from attorneys to clients but also from clients to attorneys. There is no dispute that the attorney-client privilege may, under proper circumstances, protect communications running in both directions. The Eighth Circuit did not hold otherwise. The Eighth Circuit simply recognized, as did the district court, that not all communications between attorney and client are protected. Before the attorney-client privilege will apply to protect documents, the documents must reveal in some way information communicated by a client to an attorney, in confidence, *for the purpose* of requesting or assisting in obtaining legal advice. The documents at issue reveal no such communications.

The cases cited by Searle recognize that the privilege is not absolute, but protects only documents which reveal the nature of the legal services provided or confidential information communicated in a request for legal services. In *In Re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982), for example, the Ninth Circuit did *not* hold that all of the bills, ledgers, statements and attorney time records involved were necessarily protected. Rather, the court ordered a document-by-document *in camera* inspection by the district court to segregate material which revealed the nature of the legal services provided. Likewise, in *Matter of Witnesses Before the Special March 1980 Grand Jury*,

729 F.2d 489, 495 (7th Cir. 1984), the court rejected a blanket rule of privilege for attorney-client communications, remanding so that the district court could inspect each document for privileged material. As in these cases, the proper procedure for the district court here was to examine Searle's documents one-by-one and redact information revealing confidential information communicated for the purpose of obtaining legal advice. The special master did this, in scrupulous detail.[3]

III.

The Fact That Searle's Product Has Injured Many People Resulting in Multiple Cases Does Not Justify An Expansion of Either The Work Product Doctrine or The Attorney-Client Privilege.

In an attempt to fashion a dispute worthy of this Court's attention, Searle argues in its petition that the work product doctrine and the attorney-client privilege must be revamped merely because this case involves approximately 50 separate actions, consolidated for discovery. In an attempt to construe what is truly a factual inquiry as a legal issue of tremendous import, Searle hypothesizes that plaintiffs in these and other cases will use Searle's documents on a collective, national scale to coerce inflated settlements. This hypothesis is sheer myth, with no support in the record or in logic.

The Eighth Circuit agreed with the district court that no one could possibly discern case specific reserves from Searle's aggregate reserves, which are arrived at by a complicated formula. No plaintiff's attorney will attempt to

---

[3]The special master was so protective of Searle's rights that he also ordered plaintiffs to return to Searle privileged documents which Searle had voluntarily but inadvertently produced. Pet. App. 33.

negotiate settlement on the basis of aggregate or average reserve figures because the extent of injuries in these cases varies as widely as the number of plaintiffs. Moreover, if the average reserve is artificially low by virtue of Searle's calculations, most cases will settle above the reserves. If the converse is true, most cases will settle below the reserve. In short, the settlement process will be conducted independently of the reserves calculated by Searle.

Searle suggests that Cu-7 plaintiffs nationwide will band together to demand that Searle offer its aggregate reserves in settlement of the Cu-7 cases nationwide. Nothing in the record supports this suggestion. Plaintiffs have coordinated discovery efforts in an attempt to match Searle's resources. However, plaintiffs have not coordinated settlement efforts. It is simply inconceivable that hundreds of plaintiffs nationwide would agree that the aggregate reserves constitute adequate compensation, or would agree how to apportion the aggregate reserve figure. These cases, while sharing certain common issues of liability, are individual cases — not a class action. Thus, although Searle's IUD has injured many people, the essential fact remains that each individual client retains ultimate settlement authority.

CONCLUSION

Searle's petition raises no questions of law but rather challenges the application of established work product and attorney-client privilege principles to specific documents. Searle's documents have been accorded scrupulous protection by the trial and appellate courts. Because the courts below faithfully followed the precedents of this Court, other federal courts, and the Minnesota Supreme Court, Searle's petition for certiorari should be denied.

Respectfully submitted,

ROBINS, ZELLE, LARSON
& KAPLAN
Michael V. Ciresi
*Roger P. Brosnahan
Thomas J. Conlin
1800 International Centre
900 Second Avenue South
Minneapolis, Minnesota
55402
(612) 349-8500
Attorneys for Respondent
**Counsel of Record*

Dated September 28, 1987.

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
CV 4-80-160, et al

Debra A. and George Simon, et al,

Plaintiffs,

vs.

G. D. Searle & Co.,

Defendant.

September 24, 1984

MOTIONS

Transcript of proceedings before Chief Federal District Judge Miles W. Lord at Minneapolis, Minnesota, on September 24, 1984.

APPEARANCES:

For Plaintiffs:
Leo Feeney and Tom Christianson.
Douglas Muirhead

For Defendant:
Clifford Greene and Gregory Wilmes.

[23] Nothing was presented to me by the parties to indicate which documents these would be cumulative with respect to.

I made my findings based on what was presented, and I didn't think that it would be incumbent upon me at that

point to make an independent inquiry into the other thousands of documents that were produced.

The argument was raised.

I didn't see any other documents that these would be cumulative of.

Secondly, if you are going to litigate corporate action, the key to corporate action are the documents that are created in the corporate committees — the documents going back and forth, the budget decisions — that these represent the corporate action and the corporate decision making; and that the documents that we are talking about, then, are key to the decisions that were made by the corporation at this particular point in time.

And I am not sure that you can duplicate this information by asking various officers what they thought at a particular point in time.

The documents are what you are going to need to establish what the corporation as an entity knew, what the corporation did; and the decisions that the [24] corporation made are reflected in these documents.

So I do view them as key.

Also, this ruling was in the alternative.

My initial determination was that, since these documents — that are represented in paragraph 3 — are not prepared in anticipation of litigation but are prepared for business purposes, that the documents themselves aren't work product.

This is an alternative.

If the court concludes they are work product, I would conclude they are far removed from the attorney's strategy about a particular case, and they reflect more general business strategy of the corporation, and because of the necessity

for proving what the corporation knew and what the corporation did, I believe that the standard has been met by the plaintiffs to produce this ordinary work product.

MR GREEN: Your Honor, I won't go over old ground with regard to some of the initial conclusions relating to this ruling, but I do think that we have been — in my opinion — overly inclusive in our efforts to get documents to the plaintiffs that deal on the issue of corporation decision making.

THE COURT: Let's be specific.

Take a document that you have that you are

* * *